86-1162

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

October, 1986 term

CECIL REX MCCALLA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RESPECTFULLY SUBMITTED,

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25 pp

QUESTIONS PRESENTED

Where the initial encounter between a person and police officers is not one authorized by the doctrines of Terry v. Ohio, 392 U.S. 1 (1962), can that person's rapid departure or flight from the police presence--predicated upon "knowledge of an impending search"--be utilized to support a probable cause determination?

Where the essential legal question arises in the context of a motion to suppress hearing, does a trial court violate the Sixth Amendment's confrontation clause when it relies upon hearsay about what a police officer witness would testify, when no advance notice of that police

officer's unavailability is given to defendant, the hearing has been specially set as the dispositive judicial action in the matter, the police officer is unavailable because of "training", and the hearsay is the only competant evidence that the defendant was actually given those warnings which are mandated by Miranda v. Arizona, 384 U.S. 436 (1966)?

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REFERENCE TO OPINIONS BELOW

The order denying the motion to suppress was orally entered by The Honorable Claude M. Hilton, of the United States District Court for the Eastern District of Virginia on April 25, 1986. Four pages of the transcript of the hearing which constitute the trial court's order, and the cover sheet are attached as Appendix A.

On October 21, 1986, the Court of Appeals issued its opinion, which is unpublished. This opinion is attached as Appendix B.

A timely motion for reconsideration and for reconsideration en banc was filed, and denied by order November 14, 1986. That order is attached as Appendix C.

JURISDICTION OF THIS COURT

This is a proceeding where Cecil Rex McCalla was charged by a Federal grand jury of violations of 31 U.S.C. § 841(a)(1) and 18 U.S.C. § 1952(a)(3). He sought to have oral statements and tangible evidence suppressed as having been seized in violation of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States of America. The United States District Court overruled his motion to suppress, and he entered a guilty plea, reserving the right to appeal. On appeal, the Fourth Circuit affirmed the District Court on October 21, 1986. A timely motion for rehearing was denied on November 14, 1986. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES

The Fourth Amendment to the Constitution of the United States states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

The Fifth Amendment to the Constitution of the United States states in pertinent part:

> No person shall . . . be deprived of life, liberty or property, without due process of law. . . .

The Sixth Amendment to the Constitution of the United States states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted

with the witnesses against him. . . .

STATEMENT OF THE CASE

After a hearing on Mr. McCalla's motion to suppress, at which Mr. McCalla did testify, the District Court made the following findings:

> On February 26, 1986, Agents Lee and Cornille were at Washington, D.C.'s National Airport, assigned to the Drug Enforcement Administration's "mass transit detail". The defendant was observed coming through the exit gate for flight 198, from Miami, Fla. Mr. McCalla was dressed simply in trousers and a shirt, and had no luggage. It was cold and snowing outside of the airport. Mr. McCalla was nervous, and looking around as he was exiting the airport. Once he exited, he was approached by the agents, who presented identification, but no weapons, and asked if they could ask Mr. McCalla some questions. The defendant said yes, and when asked about his ticket and flight, responded that he was at the airport to pick up a friend who was supposed to be

> on the flight, but didn't arrive. Agent Cornille then advised Mr. McCalla of the purpose of the "mass transit detail", and, at that point, Mr. McCalla fled.

The police officer testified, but the Court did not expressly find, that he asked Mr. McCalla if Mr. McCalla had any illegal drugs on him. Mr. McCalla testified that the agent asked him if he would consent to a search, and that Mr. McCalla declined. At this point, according to Mr. McCalla, the agent said that he would search Mr. McCalla anyway. Then, Mr. McCalla fled. The Court did not resolve this factual issue, but generally discredited Mr. McCalla's testimony. The Court ruled:

> In any event, I think that the officers certainly had probable cause to make a stop of this defendant from the observations they had of him, of his exit, and the manner that he was dressed in the airport, the

> manner of his exit and as nervous as he was, and the fact of flight upon being explained the purpose of the mass transit detail and knowledge of impending search. (Emphasis added.)

On appeal, the Court found that the initial encounter was not a "TERRY" stop, but held that the agents had probable cause to arrest Mr. McCalla. To support this proposition, the Court relied upon United States v. Costner, 646 F.2d 234 (5th Cir. 1981). This case was discovered by the Court sua sponte.

In his motion for reconsideration, and for reconsideration en banc, Mr. McCalla argued:

> . . . since there was no TERRY reason authorizing the police officer to detain him, his flight "added nothing" and could not be utilized in a probable cause determination. The panel relied upon COSTNER which stated:
>
> > Following the legal stop of the Plymouth, the fleeing of Costner from the

> officers was a sufficient additional factor to increase their reasonable suspicion to probable cause to arrest Costner. 646 F.2d, at 236.

With this comment, of course, Mr. McCalla has no dispute, but, as he argued in his brief, and repeated at oral argument, where there is no basis under Terry v. Ohio, 392 U.S. 1 (1968) to stop a citizen, the Fourth Amendment precludes consideration of "flight" in the probable cause calculus. The panel simply overlooked the argument of Mr. McCalla. The motion for reconsideration was denied, without comment.

MIRANDA ISSUE

As the only real issue in this case was the motion to suppress, a date certain for the hearing on that motion was requested and set at the time of

arraignment. At the hearing, there were only two witnesses, Agent Cornille, and Cecil Rex McCalla. After Mr. McCalla was apprehended, Agent Cornille testified that he was taken to the police holding area. Agent Cornille read Mr. McCalla his rights under MIRANDA. In response, however, Mr. McCalla only responded with nonsense. Later, however, Agent Cornille overheard Mr. McCalla telling Agent Lee that the cocaine which had been recovered, belonged to him. Mr. McCalla, however, testified that Agent Lee and others in the police holding area had threatened him with homosexual rape in jail, if he did not make a statement. Mr. McCalla testified that he was not given his MIRANDA rights by Agent Lee, until after he had made incriminating statements. Agent Cornille, over objection, testified

that Agent Lee had told him that he had read Mr. McCalla his rights prior to Mr. McCalla's making a statement.

The only effort by the Government to justify the non-appearance of Agent Lee at the hearing was a statement, during examination of Agent Cornille, that Agent Lee was "in training". Mr. McCalla specifically objected to any hearsay about what Agent Lee would testify saying that the agent should be available to testify. At the close of Agent Cornille's testimony, Mr. McCalla specifically moved to strike Agent Cornille's testimony because of a denial of his Sixth Amendment right to confrontation of Agent Lee. The objection was overruled, and the Court of Appeals affirmed. This petition follows.

WHY FULL BRIEFING IS NECESSARY

There is a substantial federal question involved, affecting not only instant petitioner but the nation-at-large. Accordingly, full briefing and oral argument are in order. Both the District Court, and the Court of Appeals ignored the clear teaching of this Court, and compressed the TERRY determination into a probable cause determination. Yet, that was clear error, which neither court specifically addressed, despite invitation to do so. Both Court's ruled that Mr. McCalla's "flight" when added to the other factors was sufficient to establish "probable cause". Yet, the lower court held that the flight was predicated, in part, upon "his knowledge of an impending search". Neither court, however, focused on this judicial factual determination.

Yet, the Court of Appeals utilized this "flight" as a factor supporting a finding of probable cause. This was error. In Florida v. Royer, 460 U.S. 491, 497-498, Mr. Justice WHITE, setting forth the parameters of the TERRY stop reiterated that:

> The person approached, however, need not answer any question put to him: indeed, he may decline to listen to the questions at all and may go on his way. Terry v. Ohio, 392 U.S. at 32-33 (HARLAND, J., concurring) id. at 34 (WHITE, J., concurring). He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. If there is no detention--no seizure within the meaning of the Fourth Amendment--then no constitutional rights have been infringed.

It necessarily follows from this statement, that if a citizen decides not to

cooperate with the police, but to leave, the Fourth Amendment question becomes one of "probable cause" and the "flight" no matter how rapid--without more--has no bearing on this determination. Where, moreover, the flight, is predicated upon "knowledge of an impending search" as the lower courts did find, then it would seem that the "flight" could not constitutionally play a part in the "probable cause" calculus. If this Court said what it meant in Royer, supra, upon knowledge that he was about to be searched, in a non-TERRY stop situation, Mr. McCalla was fully within his rights to depart the scene, at whatever rate he determined was appropriate.

This Court has never sanctioned a search of any person, absent either probable cause or a valid TERRY stop coupled with

a need for a protective "frisk". Yet, both the District Court, and the Court of Appeals held that even though there was no TERRY stop, the flight upon "knowledge of impending search" could be utilized to amount to probable cause. As far as petitioner can discover, no published federal decision goes so far to permit warrantless searches, absent probable cause. Thus, the holding of the lower courts that Mr. McCalla's flight could be used in a probable cause determination is simply plain error. More importantly, the lower courts seemed not to recognize the constitutional issue involved. Thus, the most important reason for this Court to review the case is to set forth the law clearly, so that all federal courts will understand it.

The decision of the Fourth Circuit is at odds with decisions of several of the State's highest courts. People v. Tebedo, 81 Mich. App. 535, 265 N.W.2d 406 (1978); Commonwealth v. Thibeau, 429 N.E.2d 1009 (Mass. 1981); Commonwealth v. Barnett, 484 Pa. 211, 398 A.2d 1019 (1979); State v. Truss, 317 So.2d 177 (La. 1975); and People v. Thomas, 660 P.2d 1272 (Colo. 1983). This very Court accepted a petition for certiorari on the same issue in People v.Shabaz, ____ U.S. ___, 106 S.Ct. 1489 (85-1265, 1986). Unfortunately, Mr. Shabaz died before his brief was filed. However, the United States of America did file an amicus brief, where it anaylized the Fourth Amendment problem in terms of TERRY and not of probable cause. In it's brief, the United States conceded that: "It may

be that the possible innocent explanation for this behavior--(flight)--would have precluded an arrest based on probable cause". Brief of the United States at 16, People v. Shabaz, No. 85-1265.

As recently as 1985, this Court had occassion to discuss "flight" in United States v. Sharpe, ____ U.S. ____, 105 S.Ct. 1568 (1985). There, every Justice except Mr. Justice STEVENS seems to imply that before flight can be a factor in the probable cause determination, some TERRY reason for a stop must exist. However, this impression was not clear. Both the praticing Bar, and the lower courts deserve a clear statement from this Court, so that the day-to-day functioning of justice can take place. The People need clarity to understand what, if any, rights are conferred upon them by the

terms of the Fourth Amendment. Accordingly, as to the Fourth Amendment issue, this Court should grant the petition.

SIXTH AMENDMENT

In Ohio v. Roberts, 448 U.S. 56 (1980), this Court stated that the Sixth Amendment imposes a "Rule of availability" that requires witnesses to be present to testify in a criminal proceeding. To this end, at arraignment, a specific date for the hearing on the motion to suppress was set. Without any notice, or any effort to seek a continuance, the Government made Agent Lee "unavailable" to testify at this hearing. The lower courts ruled that hearsay concerning Agent Lee's testimony was admissible. Yet, even at common law, the Government's making Agent Lee unavailable to testify, and face

cross-examination did not satisfy the hearsay rule. The United States could not make Agent Lee unavailable, and then utilize a traditional hearsay exception. The United States, having made Agent Lee unavailable, should not be allowed to benefit from its flat refusal to provide the most probative evidence on one of the crucial points in the case. Except for United States v. Matlock, 415 U.S. 164 (1974), this Court has not spoken on the evidentrary requirements in pre-trial proceedings. Yet, in many cases, the pre-trial proceeding is the whole ball of wax. Indeed, this case demonstrates that, since after denial of the motion to suppress, a guilty plea with right of appeal was made. The Sixth Amendment grants a right of confrontation in "all criminal prosecutions". It would be a

hallow gurantee if this right to confront could be abrogated by the United States merely by making an essential government witness unavailable. For this reason, this Court should grant review of the second question, and discuss how the Sixth Amendment applies to pre-trial, dispositive hearings.

CONCLUSION

For the reasons stated above, this Court should grant plenary review of both questions presented.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	
vs.	Cr. No. 86-72-A
CECIL REX MCCALLA, Defendant.	COPY

HEARING ON MOTIONS

April 25, 1986

Before: Claude M. Hilton, Judge

APPEARANCES:

James M. Sullivan and Clarence Albright, Counsel for the United States

Melvin Marshall and Brenda Gilliam, Counsel for the Defendant

The defendant, Cecil R. McCalla, in person

factual recitation, I apologize that the factual recitation did not point out that the defendant remained silent in response to whether he was going to answer questions. It was a misstatement of fact, and I apologize to the Court.

THE COURT: Very well. Just briefly, I think I have heard about enough argument.

MR. MARSHALL: Yes, Your Honor, page 507, 491 U.S., the Supreme Court says, we cannot agree with the state, if this is its position, that every nervous young man paying cash for a ticket, in this case to New York City, under an assumed name and carrying two heavy American Tourister bags may be held and can be arrested. We think that Royer itself is on all fours with this.

THE COURT: I would find from the

evidence that on February 26, 1986, Agent John Cornille along with Agent Lee were at National Airport. That both of those persons are assigned to the mass transit detail with the DEA which has the purpose of interdicting drugs from certain source cities in the United States. They were at the airport observing gate 23 for the purpose of observing those persons deplaning from flight 198 of Eastern Airlines from Miami.

That this defendant was seen coming through the exit gate coming from flight 198. That he was the fourth passenger to come off the plane. That he was dressed simply in trousers and a shirt, but no luggage. That it was cold outside, and in

fact was snowing at the time. He had no coat on or any wrap other than a shirt.

He carried no baggage, that he was nervous, that he was looking around as he was exiting the airport.

Once he did exit the airport, he was approached by Agents Cornille and Lee, who at the time were dressed in coats and ties, showed no weapons to the defendant, but simply presented identification, told them who they were, that they were with the mass transit detail, and asked if he would answer some questions. The defendant said yes, and was asked about the flight and the ticket for the flight that he had come on. And his answer was that he was there to pick up a friend who was on the, supposed to be on the flight but didn't arrive.

Agent Cornille then advised him of the purpose of the mass transit detail. And at that point the defendant started to run. He ran out of the airport to the

south, ran away from the airport to the south, dropped over a fence and down several feet onto a roadway, and started running up the roadway.

Both Agent Lee and Agent Cornille were in pursuit. Agent Lee following the same path over the fence and down onto the roadway, while Agent Cornille proceeded around and down some stairs to get to the same place.

Agent Lee managed to hail a cab, got in, and continued to follow this defendant. That at some point while in the cab following the defendant, he saw him slow down from running, stoop down at some point behind a red pickup truck, straighten

back up, and commence running again.

Agent Lee did catch up with the defendant, and Agent Cornille came back

into view at about that time and saw the defendant with his hands on the cab with Agent Lee out of the cab.

He was then taken to the, the defendant was then taken to the police station in National Airport. An FAA officer along with detective Lee returned a few minutes later to the rear of that red pickup truck and picked up a package allegedly containing narcotics. It was snowing outside, there was snow on the ground, there was snow on the package.

I would find from these facts that the package in question was abandoned, that this defendant has no standing to raise the issue of suppression because it was abandoned property.

In any event, I think that the officers certainly had probable cause to make a stop of this defendant from the observations they had of him, of his exit, and

the manner that he was dressed in the airport, the manner of his exit, and as nervous as he was, and the fact of his flight upon being explained the purpose of the mass transit detail and knowledge of an impending search.

Somehow the defendant's indication that he ran out of the airport, over some grass, over a fence, jumped down 14 feet, and ran a couple hundred yards up the road just to get to a

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point where people wouldn't see him being searched, doesn't somehow have the ring of truth to it.

After he was brought to the police station. I think the testimony is clear that Agent Cornille advised him of his Miranda rights, and he indicated that he understood them. He was advised again by Agent Lee, and thereafter made some

statement in regard to this package.

But I would think that the evidence clearly supports that whatever he said was made after an advice of his Miranda rights, a knowing waiver of those rights that was free from any kind coercion from any of these officers. And therefore, the motion to suppress the statements would be denied.

MR. MARSHALL: Thank you, Your Honor.

THE COURT: If you have nothing further, we will stand in recess.

HEARING CONCLUDED

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

COPY

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5111 **UNPUBLISHED**

United States of America,
Appellee,

versus

Cecil Rex McCalla,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, District Judge. (CR-86-72-A)

Argued: October 6, 1986

Decided: October 21, 1986

Before WINTER, Chief Judge, and CHAPMAN and WILKINSON, Circuit Judges.

Melvin Anthony Marshall for appellant; James Michael Sullivan, Special Assistant, United States Attorney (William G. Otis, Assistant U.S. Attorney; Henry E. Hudson, United States Attorney on brief) for appellee.

PER CURIAM:

Defendant appeals his conviction for possession of cocaine with intent to distribute. He argues that the district court wrongly denied his motion to suppress certain evidence. Finding no error, we affirm.

Defendant asserts that the district court erred by admitting hearsay testimony at the suppression hearing. This argument has no merit. Federal Rule of Evidence Rule 104(a) provides that the court at a preliminary proceeding is not bound by the rules of evidence except for the rules governing privileges. Thus, the Supreme Court has reversed a district judge's refusal to admit hearsay at a suppression hearing. United States v. Matlock, 415 U.S. 164, 172-75 (1974). It is possible that heavy reliance on

unsupported hearsay at a suppression hearing may raise a constitutional question. In this case, however, the district judge based his findings mostly on live testimony; he relied on hearsay merely to supplement that testimony.

We also reject defendant's claim that the government agents "seized" him without a reasonable suspicion when they approached him outside the airline terminal. The encounter was not a Terry stop. The agents did not restrain the liberty of the defendant; they merely approached him and asked him whether he would answer some questions.

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Nor can we agree with defendant's assertion that the agents lacked probable cause to arrest. The defendant behaved suspiciously when he deplaned, carried no luggage, wore light clothing even though

it was snowing outside, lied when asked about his plane flight, and fled when asked about drugs. Although none of these factors alone would supply probable cause, they are more than sufficient when considered together. See United States v. Costner, 646 F.2d 234, 236 (5 Cir. 1981).

Finally, we affirm the district court's holding that the confession was voluntary. This finding was not clearly erroneous; indeed, the record contains ample evidence to support it.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-5111

United States of America,

Appellee,

versus

Cecil Rex McCalla,

Appellant.

Appeal from the United States District Court for the Eastern Distict of Virginia, at Alexandria. Claude M. Hilton, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter, with the concurrence of Judge Chapman and Judge Wilkinson.

For the Court,

JOHN M. GREACEN

CLERK

*/ Filed Nov. 14, 1986, U.S. Court of Appeals Fourth Circuit